ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
FILE

In the Matter of:	)	
	)	
Tariff Filing Requirements for	)	CC Docket No. 92-13
Interstate Common Carriers	)	

REPLY COMMENTS OF
MCCAW CELLULAR COMMUNICATIONS, INC.

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April 29, 1992

Summary

This proceeding, which concerns the federal tariffing obligations of common carriers, arises from a dispute between the nation's two largest landline interexchange carriers. However, it raises unintended ramifications for mobile service providers, which have never been required to tariff their interstate offerings. Such a requirement would be directly contrary to the public interest, since it would impede investment in new services, broader coverage areas, and more efficient technology, and would diminish the ability of cellular carriers to respond rapidly and completely to the needs of their subscribers.

Congress and the Commission have long recognized that mobile services raise unique jurisdictional issues, which are not present in the traditional long distance marketplace. Mobile services repeatedly have been characterized as predominantly intrastate, even where they overlap state boundaries. Accordingly, the Commission has never required mobile carriers to file federal tariffs.

The Commission can and should continue to forbear from regulating mobile carriers' interstate services. It has ample authority under Section 203 of the Communications Act to permit mobile carriers not to file tariffs. In addition, Congress has been aware of the forbearance policy from the beginning and has never disapproved it. In fact, in enacting Section 332 of the Communications Act, Congress

effectively ratified the forbearance policy for mobile services. These factors clearly distinguish the Commission's forbearance policy from the ICC orders considered in Maislin Industries.

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McCaw Cellular Communications, Inc. ("McCaw"), by its attorneys, respectfully submits its reply comments in the above-captioned proceeding. As McCaw discusses herein, the Commission is not legally compelled to require mobile service providers to tariff their interstate services, and doing so would disserve the public interest.

I. INTRODUCTION

This proceeding results from a dispute between the two largest carriers in the landline interexchange marketplace. In 1989, AT&T filed a complaint alleging that MCI was unlawfully providing service to certain customers at off-tariff rates, terms, and conditions. The Commission dismissed AT&T's complaint, finding that MCI had acted consistently with the agency's longstanding forbearance policy. Nonetheless, the Commission decided to re-examine the lawfulness of forbearance in light of the Supreme Court's 1990 decision in Maislin Industries.[1]

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[1] Maislin Industries, Inc. v. Primary Steel, Inc., 110 S.Ct. 2759 (1990).

McCaw is one of the largest U.S. cellular carriers, as well as the sixth largest domestic paging carrier. Although this proceeding is focused on the traditional long distance marketplace, McCaw is concerned that the outcome might affect mobile service providers to the extent they offer interstate services. It is conceivable that, if the Commission simply eliminated the forbearance policy, McCaw would be required for the first time to tariff its jurisdictionally interstate offerings.[2] Accordingly, McCaw urges the Commission to carefully consider the unique legal and operational differences between mobile carriers and landline IXCs and to retain forbearance regulation of interstate mobile offerings.

II. MOBILE SERVICES RAISE UNIQUE JURISDICTIONAL ISSUES.

Mobile services raise unique jurisdictional issues that are not found in the traditional interexchange service market. Long before adoption of the forbearance policy, Congress and the Commission concluded that mobile services should not be tariffed at the federal level.[3] For example,

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[2] McCaw provides limited international resale services to its subscribers. Consistent with the Commission's international competitive carrier policies, McCaw has filed a tariff for these services. See Continental InterCell Tariff FCC No. 1.

[3] Of course, the Commission has long emphasized and exercised its jurisdiction over interconnection arrangements for mobile carriers to ensure that important federal radio licensing and public interest objective were not thwarted by exchange telephone companies. See Guardband, 12 F.C.C.2d 841 (continued...)

in 1954, at the Commission's request, Congress amended Sections 2(b) and 221(b) of the Communications Act to make clear that radio-based services that happen to cross state boundaries are subject to state, not FCC, regulation.[4] As the Senate Report regarding the amendment explained, "[t]he legislation is designed to make certain that the use of radio will not subject to Federal regulation companies engaged primarily in intrastate operations."[5]

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[3](...continued)
(1968), recon. denied, 14 F.C.C.2d 269, aff'd, Radio Relay Corp. v. FCC, 409 F.2d 269 (2d Cir. 1969); Interconnection Between Wireline Telephone Carriers and Radio Common Carriers, 63 F.C.C.2d 87 (1977), 80 F.C.C.2d 352 (1980); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 R.R.2d 1275 (1986); Interconnection Declaratory Ruling, 2 FCC Rcd 2910 (1987) (affirming exclusive FCC jurisdiction over the provision of interconnection facilities, allocation of NXX codes and telephone numbers, and the requirement for good faith interconnection negotiations).

[4] Public Law No. 345, 83rd Cong. 2d Sess., approved April 27, 1954, 68 Stat. 63-64. The legislation was developed jointly by the FCC and the U.S. Independent Telephone Association.

[5] S.Rep. No. 1090, 1954 U.S. Code. Cong. and Admin. News 2133. The courts, too, have long acknowledged the fundamentally intrastate nature of most mobile services. See, e.g., Radio Telephone Communications, Inc. v. South Eastern Telephone Co., 170 So.2d 577 (Fla. 1965), which explained that mobile services:

> are essentially intrastate in nature, even tough the radio portion of such services might "spill over" into the adjoining state, since a radio signal cannot recognize nor stop at a state line; and it is clear that Congress intended to reserve to the several states the right to regulate such intrastate services in the manner specified in Section 221(b).

(continued...)

Eleven years later, the Commission released a Public Notice stating that RCCs could no longer file federal tariffs when the reliable service area of their base stations was confined to a single state or they provided interstate service only through interconnection with a landline telephone company.[6] In 1975, the Commission re-published and expanded upon this Public Notice. It clarified that:

> an RCC whose reliable service area does extend beyond state borders is not required to file tariffs with the FCC for such service wherever RCC service is subject to regulation by state or local authority.[7]

In authorizing the cellular service, the Commission continued the unique and complementary federal/state relationship for mobile services. The Commission concluded that "[o]ur assertion of federal primacy focuses on entry

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[5](...continued)
See also United States v. Western Elec. Co., 578 F. Supp. 643, 645 (D.D.C. 1983): "mobile radio services are 'exchange telecommunications services' within the meaning of section II(D)(3) of the decree ...."

[6] Public Notice, FCC Announces New Policy Regarding Filing of Mobile Tariffs, 1 F.C.C.2d 580 (1965).

[7] FCC Policy Regarding Filing of Tariffs for Mobile Service, 53 F.C.C.2d 579 (1975) (emphasis added). The Commission continued:

> However, it should be noted that in those cases where an RCC applies a charge for its portion of interstate message toll service furnished through interconnection with a land line carrier, such charge is to be set forth in tariffs filed with the FCC either by the RCC in its tariff or by an issuing carrier, on behalf of the RCC, in tariffs providing for interstate message toll telephone service.

qualifications and in accordance with Sections 2(b) and 221(b) of the Act, reserves to the states jurisdiction with respect to charges ... for service by licensed carriers."[8] Notably, the Commission declined to require the filing of federal tariffs, notwithstanding its recognition that "cellular systems can provide both intrastate and interstate communication."[9]

Over the last several years, the Commission has re-affirmed this basic approach to mobile services on several occasions. For example, in its 1984 access charge decision, the Commission explained that:

> The RCCs provide "exchange service" under sections 2(b) and 221(b) of the Communications Act, and we have consistently treated the mobile radio services provided by RCCs and telephone companies as local in nature .... We conclude that they are not and should not be treated as interexchange carriers under Part 69.[10]

Similarly, in its 1986 Interconnection Policy Statement, the Commission held that "cellular carriers are generally engaged in the provision of local, intrastate, exchange telephone service ...."[11] It reiterated this holding a year later,

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[8] Cellular Communications Systems, 89 F.C.C.2d 58, 96 (1982).

[9] Cellular Communications Systems, 86 F.C.C.2d 469, 504 n.74 (1981).

[10] MTS and WATS Market Structure, 97 F.C.C.2d 834, 882 (1984).

[11] The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, supra, 59 Rad. Reg.2d at 1278 (1986).

stating that "[Public Mobile Service] carriers are generally regarded as exchange service providers, not interexchange carriers."[12]

As this recitation of the Commission's longstanding policy demonstrates, the Commission considers most cellular and paging services to be jurisdictionally intrastate, even when they happen to cross state boundaries.[13] Neither Maislin nor any of the arguments advanced by AT&T in its complaint against MCI raises issues pertaining to this policy. Accordingly, in determining whether to continue forbearance regulation of interstate services, the Commission should take care to recognize the unique jurisdictional balance applicable to mobile services.

III. THE COMMISSION CAN AND SHOULD CONTINUE TO FORBEAR FROM REGULATING INTERSTATE MOBILE SERVICES.

Recently, many cellular and paging carriers have begun providing interstate services as a supplement to their local communications offerings. For example, McCaw has introduced the North American Cellular Network, which automatically delivers calls to subscribers wherever on the network they

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[12] Interconnection Policy Statement, supra, 2 FCC Rcd at 2916.

[13] The jurisdictional nature of mobile services is further complicated by the fact that a call may change from intrastate to interstate and back again during the course of a single conversation. McCaw submits that the intrastate component is sufficient to support the Commission's voluntary deference to state jurisdiction.

are roaming.[14] McCaw also provides long distance calling capabilities to its subscribers.

McCaw has never been required to file federal tariffs for these offerings, because the Commission has expressly forborne from regulating jurisdictionally interstate mobile services:[15]

> Public Land Mobile Service licensees providing interstate mobile services possess insufficient market power to charge unlawful rates ... and therefore constitute "non-dominant" carriers .... [N]on-dominant carriers are subject to "forbearance," and need not file tariffs with the FCC for their interstate services.[16]

For the reasons discussed below, the Commission has ample authority to continue its forbearance policy with respect to mobile services.

A. Forbearance Is Lawful, Particularly With Respect to Mobile Services.

The opening comments persuasively demonstrate that the general forbearance policy is consistent with the

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[14] The NACN also automatically allows subscribers who are roaming to enjoy all the features they subscribe to on their home system.

[15] McCaw also believes that the 1975 Public Notice provides an independent basis for permitting cellular carriers to resell long distance service without filing tariffs in cases where the charge imposed by the reseller is set forth in the tariff of the underlying carrier. See footnote 7, supra.

[16] Preemption of State Entry Regulation in the Public Land Mobile Service, 59 Rad Reg.2d 1518 (1986), at ¶ 33, reversed on other grounds, NARUC v. FCC, No. 86-1205 (D.C. Cir. March 30, 1987), aff'd in relevant part, FCC 87-319 (Oct. 21, 1987).

Communications Act. As a multitude of commenters explained,[17] the Commission has authority under Sections 203(b)(2) and 203(c) of the Communications Act[18] to exempt particular classes of carriers from the tariff filing requirement imposed by Section 203(a). In addition, many commenters illustrated that a long line of precedent supports the validity of an agency's interpretation of its own statute, particularly when Congress was aware of that interpretation, declined to change it, and affirmatively acquiesced in it -- as Congress did here in enacting the informational tariff filing requirement of TOCSIA.[19] It is

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[17] See, e.g., Ad Hoc Telecommunications Users Committee at 9-13; MCI at 5-18; Metropolitan Fiber Systems at 6.

[18] Section 203(b)(2), 47 U.S.C. § 203(b)(2), provides that:

> The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions ....

Section 203(c), 47 U.S.C. § 203(c), provides that:

> [n]o carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in [interstate] communications unless schedules have been filed and published in accordance with the provisions of this Act ...." (Emphasis added.)

[19] See, e.g., MCI at 25-35; Williams Telecommunications at 7-11; Cellular Telecommunications Industry Association at 14; Metropolitan Fiber Systems at 7-11. These parties cited a large number of cases, including Red Lion Broadcasting v. FCC, 395 U.S. 367, 394 (1969); U.S. v. Rutherford, 442 U.S. 544 (1979); Bob Jones University v.

(continued...)

not necessary to reiterate these arguments in detail here, except to note that they apply to interstate mobile services with equal force.

Indeed, the legal basis for exempting carriers from federal tariffing is even stronger in the mobile context. In 1982, Congress amended the Communications Act to add Section 332(c), which preempts state regulation of SMRS and other private radio operators. The legislative history of this provision states that "[n]othing in this subsection shall be construed as prohibiting the Commission from forbearing from regulating common carrier land mobile services ...."[20] This statement powerfully reinforces the Commission's forbearance authority with respect to mobile services.

B. The "Special Circumstances" of the Mobile Industry Demonstrate that Forbearance Is Sound Policy.

Moreover, even if the Commission concludes that it does not have sufficient authority to forbear from regulating all non-dominant carriers, or if it voluntarily decides to retreat from forbearance, forbearance would still be both

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[19](...continued)
U.S., 461 U.S. 574 (1983); NLRB v. Bell Aerospace, 416 U.S. 267 (1976); McCaughn v. Hershey Chocolate Co., 283 U.S. 488 (1931); Kirkhuff v. Nimmo, 683 F.2d 544, 549 (D.C. Cir. 1982); Mobil Corp. v. Federal Energy Administration, 566 F.2d 87 (Temp. Emer. Ct. App. 1977); Kay v. FCC, 443 F.2d 638, 646-47 (D.C. Cir. 1970).

[20] H. Conf. Rep. No. 97-765 at 56, 1982 U.S. Code Cong. and Ad. News 2237, 2300.

justifiable and sound policy for mobile carriers. Section 203(b)(2) gives the Commission permission to modify the tariffing requirement "in particular circumstances" or "by general order applicable to special circumstances or conditions."[21] Such special circumstances clearly exist for mobile services:

- First, jurisdictionally interstate services represent only a small portion of mobile carriers' total offerings, unlike landline resellers or facilities-based carriers. This proportion is not likely to increase even as the amount of interstate service grows, since subscribership will grow markedly as well (and it may be expected that new subscribers, who use their phones less, will use fewer interstate services).

- Second, mobile carriers have never been required to file tariffs, unlike landline resellers or facilities-based carriers.

- Third, forcing mobile carriers to file tariffs would impede investment in new services, expanded coverage areas, and spectrum-efficient digital technology. The substantial additional costs engendered by tariffing would need to be either absorbed (which would foreclose a portion of capital spending) or passed on to subscribers (which would

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[21] 47 U.S.C. § 203(b)(2).

reduce revenues and decrease subscribership because of elastic demand). In either event, customers would suffer.

- Fourth, tariff filings would seriously impede the ability of cellular carriers to develop innovative services and competitive pricing plans. Cellular is still a relatively new service, and McCaw is constantly striving to enhance its attractiveness to subscribers by offering different combinations of monthly recurring charges and air-time charges. For example, McCaw estimates that in many of its systems, it has experimented with over 100 rate plans since service was initiated. Even a minimal tariffing requirement would deter carriers from developing new rate plans because of the expenses associated with filing.

- Fifth, the Commission has found that "[f]iling [cellular] rate information with the Commission could conceivably be anticompetitive in that it would provide competitors advance notice of price changes."[22]

- Finally, the mobile services market is extremely competitive. As Telocator explained in its initial comments, RCC services in general are highly unconcentrated and mobile services have been growing at an exceptional rate, rendering tariff regulation "both unwarranted and contrary to the interests of consumers."[23] Moreover, cellular services in

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[22] Cellular Resale NPRM, 6 FCC Rcd at 1725.

[23] Telocator at 5-6.

particular are provided in a robustly competitive market. The two licensees in each market compete vigorously with respect to price (where rates in most markets have declined in real terms despite continued high investment requirements), coverage area, and new services. They also face substantial competition from hundreds of resellers around the country, enhanced SMR providers such as Fleet Call, and common and private carrier paging companies. Accordingly, a tariffing requirement for interstate cellular services would be unwarranted and contrary to the public interest.[24]

IV. CONCLUSION

For the foregoing reasons, McCaw submits that there is no legal or policy reason to require mobile service providers

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[24] For a more detailed discussion of cellular competition, see Reply Comments of McCaw, CC Docket No. 91-34, filed June 19, 1991, at 7-14.

to file tariffs for their jurisdictionally interstate offerings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 1992, I caused copies of the foregoing "Reply Comments of McCaw Cellular Communications, Inc." to be hand-delivered to the following:

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